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Supreme Court of the United States

OCTOBER TERM, 1941.

No. 675.

AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Plaintiff,

—against—

INTERBOROUGH RAPID TRANSIT COMPANY,
Defendant.

Application of City Investing Company and 165 Broadway Building, Inc. re Preferred or Trust Claims against the Defendant and/or its Receiver.

CITY INVESTING COMPANY,
Petitioner,

—against—

165 BROADWAY BUILDING, INC., and THE CITY OF NEW YORK,
Respondents.

PETITION FOR WRIT OF CETIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

ELMER O. GOODWIN,
Counsel for Petitioner.

EDWARD F. CLARK,
Of Counsel.

THE COURT PRESS, N. Y. C.

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Supreme Court of the United States

OCTOBER TERM, 1941.

No. .

AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Plaintiff,

—against—

INTERBOROUGH RAPID TRANSIT COMPANY,
Defendant.

Application of City Investing Company and 165 Broadway Building, Inc. re Preferred or Trust Claims against the Defendant and/or its Receiver.

CITY INVESTING COMPANY,
Petitioner,

—against—

165 BROADWAY BUILDING, INC., and THE CITY OF NEW YORK,
Respondents.

Petition for Writ of Certiorari.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

PRELIMINARY AND JURISDICTIONAL STATEMENT.

Petitioner, City Investing Company, by its counsel, prays that a writ of certiorari issue to review a decision of the United States Circuit Court of Appeals for the Second Circuit, rendered June 2, 1941, reversing an order (R. 8-10) of the United States District Court for the Southern District of New York in favor of petitioner, which confirmed the report of a Special Master appointed by said District Court (R. 16-50). Petition for rehearing was denied and order for mandate made on July 8, 1941 (R. 246-247).

The jurisdiction of this Honorable Court is invoked under

Section 240(a) and Subsection 8(a) of the Judicial Code, as amended, Title 28 U. S. C., Sections 347 and 350, and Supreme Court Rule 38, par. 5(b).

Summary Statement.

The subject matter of the litigation involves the conflicting claims of the petitioner (R. 66-74), and of the respondent, 165 Broadway Building, Inc. (R. 60-65), asserted against the Receiver of Interborough Rapid Transit Company (hereinafter called the Railway Company), in federal equity receivership proceedings entitled "American Brake Shoe and Foundry Company, plaintiff, against Interborough Rapid Transit Company, defendant". The respective claims are based upon a contract of 1907 entered into between the Railway Company and Broadway-Cortlandt Company, the then owner of premises in the City of New York, known as 165 Broadway, pursuant to which the Railway Company obtained the right to make connection from its elevated structure and station platform with said premises, and Broadway-Cortlandt Company deposited with the Railway Company the sum of $10,000 for payment of the salary of a ticket chopper, and also expended the sum of $13,557.15 as the cost of constructing certain bridges, structures and connections from the elevated railway to the premises in question, which sums were to be repaid by the Railway Company upon discontinuance of said connection of its elevated railway structure with said premises (R. 176-186).

The elevated structure and railway was demolished and the connection between the building and said railway structure discontinued and removed in April 1939 (R. 22).

Petitioner is the assignee of Broadway-Cortlandt Company in and to its rights to receive the repayment of the moneys in question (R. 68, 72). Petitioner, being also a former owner of said premises, as grantee of Broadway-Cortlandt Company, expressly reserved its rights to receive

said moneys when it subsequently conveyed the real property (R. 69, 72).

165 Broadway Building, Inc. (hereinafter referred to merely as "the respondent") is a subsequent grantee of said premises, deriving title through a mortgagee who, as the Special Master found, acquired its lien upon the premises with notice, actual or constructive, of petitioner's rights and of its express reservation of such rights in and to the funds in dispute (R. 44).

Neither the Receiver, nor the City of New York, which is taking over the receivership estate, subject to the obligation of paying allowed claims, is now concerned in this litigation, being willing to pay the moneys in dispute to the person determined entitled thereto (R. 212). The sole question involved, therefore, is the right to receive payment as between the petitioner and respondent.

The report of the Special Master awarded payment of the moneys to petitioner (R. 49-50), which report was confirmed by order of the District Court (R. 8-10). The Circuit Court of Appeals, in reversing the District Court, has held that respondent, 165 Broadway Building, Inc., is entitled to receive payment of said moneys (R. 223).

Questions Presented and Reasons for the Allowance of the Writ.

Question 1. Whether the decision of the court below, holding that the right to receive payment from the railway Company was not an affirmative covenant, personal in nature, but was, on the contrary, a real covenant running with the land, is in conflict with the law of the State of New York, established by its highest court.

Reasons: The decision of the court below is directly contrary to an analogous decision by the Court of Appeals of the State of New York in *Meado-Lawn Homes, Inc.* v. *Westchester Lighting Co.*, 171 Misc. 669, 13 N. Y. S. (2d) 709, affirmed 259 App. Div. 810, 20 N. Y. S. (2d) 396,

affirmed without opinion 284 N. Y. 667, 30 N. E. (2d) 608 (1940), reaffirming the New York rule as to personal, affirmative covenants of this nature as established in *Cole* v. *Hughes*, 54 N. Y. 444, 13 Am. Rep. 611, and similar cases.

The court below admits that the New York law has always been contrary to the running of such a covenant (R. 216-217), but bases its decision upon the contention that the New York law in that respect has been changed by the decision of the New York Court of Appeals in *Neponsit Property Owners' Association* v. *Emigrant Industrial Savings Bank*, 278 N. Y. 248, 15 N. E. (2d) 793 (1938). As appears under Point I of petitioner's brief, the court below has misconstrued and misinterpreted the scope and extent of the *Neponsit* case, *supra*, and has disregarded the applicable rule of law as established by the *Meado-Lawn* case, *Cole* v. *Hughes*, *supra*, and other New York cases.

QUESTION 2. Whether the decision of the lower court is in conflict with the law of the State of New York, as established by its highest court, that respondent was chargeable with notice of the complete and effective reservation by petitioner of all rights to receive repayment of the moneys from the Railway Company.

REASONS: Petitioner's title is derived by express assignment of the rights of the party originally contracting with and who made the payments to the Railway Company. In addition, after acquiring the real property from said company, petitioner, upon a subsequent conveyance of the premises, effectively reserved its rights in and to the moneys in question by express reservation in its contract of sale (R. 170). Such reservation, relating merely to a chose in action, was naturally omitted from petitioner's deed to its grantee, but an agreement was entered into at the time of delivery of said deed, stating in substance (R. 172) that the subject clauses contained in the

contract should not be deemed merged in the deed. Respondent derives title through a mortgagee, who loaned money and consolidated the new loan and other mortgages into a consolidated mortgage, under an agreement made with the mortgagor, that said mortgage should be "Subject, however, * * * to agreements relating to maintenance of elevated station * * *" (R. 193). The deed into said mortgagor conveyed the premises "Subject to * * * unrecorded agreements affecting said real estate * * *" (R. 192). Such references were found by the Special Master to refer to petitioner's reservation and to put respondent on notice thereof (R. 44). The decision of the Circuit Court to the contrary (R. 221-222) is in conflict with the rule of constructive notice as established by the highest New York court in *Sweet* v. *Henry*, 175 N. Y. 268, 67 N. E. 574, and other cases referred to in Point II of the annexed brief. Moreover, the decision of the court below, in so far as it holds that the rights of petitioner could not be effectively reserved, is not only in conflict with the New York law of personal covenants, but also the rule established by the New York Court of Appeals in *Drucker* v. *Manhattan Railway Co.*, 213 N. Y. 543, 108 N. E. 74, and related cases.

Question 3. Whether the decision of the lower Court is also in conflict with the long standing rule of law in New York State, as established by its highest court, that a subsequent grantee, in order to rely upon the protection of the Recording Act, must sustain the affirmative burden of proving that he is a purchaser in good faith and without notice.

Reasons: The New York rule, as established by the case of *Hood* v. *Webster*, 271 N. Y. 57, 2 N. E. (2d) 43, and many earlier New York cases, imposed upon the respondent the burden of proving affirmatively that its title was acquired in good faith and without notice, actual

or constructive, of the rights of petitioner. No such proof was given or offered by respondent in the hearing before the Special Master. The holding of the court below to the contrary is, therefore, in conflict with the established law of the State of New York.

It is submitted that each of the questions set forth above involves a local rule of property of the State of New York on matters of general importance, affecting titles to real property in that state, and requiring adherence thereto by the federal courts. *Tyler* v. *U. S.*, 281 U. S. 497, 74 L. Ed. 991; *Edward Hines Trustees* v. *Martin*, 268 U. S. 458, 69 L. Ed. 1050; *Warburton* v. *White*, 176 U. S. 484, 44 L. Ed. 555; *Erie Railway Co.* v. *Tompkins*, 304 U. S. 64, 82 L. Ed. 1188.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals of the Second Circuit, commanding said court to certify and send to this Court a full and complete transcript of the record of the proceedings of the said Circuit Court had in the case numbered and entitled on its docket, No. 291, American Brake Shoe and Foundry Company, plaintiff, against Interborough Rapid Transit Company, defendant; subtitle, 165 Broadway Building, Inc., appellant, against City Investing Company, appellee, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of said Circuit Court of Appeals be reversed by the Court, and for such further relief as to this Court may seem proper.

Dated, New York City, October 1, 1941.

ELMER O. GOODWIN,
Counsel for Petitioner.

EDWARD F. CLARK,
Of Counsel.

Supreme Court of the United States

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No. .

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Plaintiff,

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Application of City Investing Company and 165 Broadway Building, Inc. re Preferred or Trust Claims against the Defendant and/or its Receiver.

CITY INVESTING COMPANY,
Petitioner,

—against—

165 BROADWAY BUILDING, INC., and THE CITY OF NEW YORK,
Respondents.

BRIEF IN SUPPORT OF PETITION.

Opinions of Courts Below.

The opinion of the Special Master is printed in the record, pages 16 to 50 inclusive. The opinion of the United States District Court for the Southern District of New York confirming said report is printed at page 202 of the record. The opinion of the Circuit Court of Appeals for the Second Circuit is in the record, pages 207 to 224 inclusive (including dissenting opinion). The opinion of the Circuit Court of Appeals is reported, *165 Broadway*

Building Inc. v. *City Investing Company,* 120 F. (2d) 813 (dissenting opinion, p. 820).

Basis for Jurisdiction.

The statement showing the grounds upon which jurisdiction of this Court is invoked is set forth at pages 1 and 2 of the foregoing petition, and, by reference, adopted as part of this brief.

Statute Involved.

Chapter 52 of the Laws of 1909 of the State of New York (Real Property Law),

"Section 291:

"A conveyance of real property, within the state, on being duly acknowledged by the person executing the same, or proved as required by this chapter, and such acknowledgment or proof duly certified when required by this chapter, may be recorded in the office of the clerk of the county where such real property is situated, and such county clerk shall, upon the request of any party, on tender of the lawful fees therefor, record the same in his said office. Every such conveyance not so recorded is void as against any subsequent purchaser in good faith and for a valuable consideration, from the same vendor, his heirs or devisees, of the same real property or any portion thereof, whose conveyance is first duly recorded."

Statement.

The material facts have been set forth in the Summary Statement at pages 2 and 3 of the foregoing petition, and are, by reference, adopted as part of this brief.

The Special Master, in his report (R. 16-50), confirmed by the District Court (R. 8-10), found the following:

1. That there was no privity of estate between the Railway Company and Broadway-Cortlandt Company (R. 46).

2. That under the laws and decisions of the State of New York covenants to repay sums of money such as are contained in paragraphs "Tenth" and "Eleventh" of the 1907 agreement are not covenants which touch or concern the land (R. 46).

3. That such covenants are purely affirmative and personal in character (R. 46).

4. That such personal covenants cannot be changed by the use of the general language in paragraph "Sixteenth" of the 1907 agreement into covenants running with the land (R. 48).

5. The fact that the present owner was compelled, by the demolition of the railway and the connecting link between the elevated station and the west wall of 165 Broadway to make certain repairs at its own cost, did not make the covenants in question touch or concern the land (R. 49).

6. That the petitioner acquired from Broadway-Cortlandt Company whatever rights the latter had with respect to the repayment of the sums of $10,000 and $13,557.15 (R. 43).

7. That the petitioner had the power to and did reserve to itself the right to repayment of the sums involved (R. 48-49).

8. That the respondent had constructive notice of said reservation by petitioner of the right to repayment (R. 44 and 45).

9. That the sums of $10,000 and $13,557.15 are due and payable to the petitioner and the claims of the respondent should be dismissed (R. 50).

Specifications of Error.

The Second Circuit Court of Appeals erred in each of the following respects by holding, in conflict with the controlling New York law:

(a) That the right to receive payment of the moneys in question ran with the land (R. 220);

(b) That respondent was not chargeable with notice of petitioner's reservation of right to receive the moneys in question (R. 221-222);

(c) That petitioner could not effectively reserve the right to receive payment as against subsequent grantees (R. 222);

(d) That respondent is protected as a bona fide purchaser for value and without notice under the Recording Act, and, in effect, that respondent did not have the affirmative burden of proving that it was such a purchaser for value, without notice, actual or constructive (R. 221-222);

(e) That respondent is entitled, as against petitioner, to receive repayment of the moneys in dispute (R. 223).

Argument.

The foregoing Specifications of Error are resolved, for purposes of the argument, in this brief into the three

points hereinafter set forth, each of which shows important departures by the Court below from the controlling law of the State of New York, as established by its highest court in matters involving local rules of property.

POINT I.

The decision of the Court below, holding that the right to receive payment from the railway company was not an affirmative covenant, personal in nature, but was, on the contrary, a real covenant running with the land, is in conflict with the law of the State of New York, established by its highest court.

The exact problem with which the courts below have had to deal in this case should be noted at the outset. It has nothing to do with any question as to whether the burden of a covenant runs with the land, for there was no transfer of the railway's obligations except as the City of New York eventually assumed them. The basic situation was, that under an agreement between the owner of a building and the owner of an elevated railway structure, which created certain mutual easements, the owner of the building paid to the Railway Company certain moneys, for the purpose of securing the latter from loss from expenditures made or to be made by it in connection with the easements and the Railway Company expressly covenanted to repay these moneys upon the easements terminating (six months after in case of the $10,000) (R. 181-183).

The sole question involved in this point is: Did the benefit of the covenant, that is the right to receive the moneys when repayable remain in the original covenantee (or its assigns) or pass with the lands from owner to owner thereof?

As was said in substance by the Special Master in his report (R. 46), no New York cases are to be found where such covenants to repay sums of money have been held to be covenants which touch or concern the land, but, on the contrary, they have invariably been held to be purely affirmative and personal in character.

Perhaps most closely analogous are the cases of security deposits in connection with leases. Although a lease creates an estate for years in lands and its ordinary covenants touch and concern the land and so run with it, it has been invariably held in New York that the right of the tenant to repayment of the security deposit, when repayable, is purely personal to the original depositing tenant and does not pass to subsequent tenants with the leasehold, but only by express assignment independent of the lease.

Fallert Brewing Company, Ltd. v. *Blass*, 119 App. Div. 53, 103 N. Y. S. 865;

Shattuck v. *Buck*, 158 App. Div. 709, 143 N. Y. S. 1045;

Richards v. *Browning*, 214 App. Div. 665, 212 N. Y. S. 738;

Mauro v. *Alrino*, 90 Misc. 328, 152 N. Y. S. 963 (Appellate Term, First Dept. Opinion by Lehman, *J.*, now Chief Judge of the New York Court of Appeals, cited with approval in Court of Appeals cases);

Goodale Real Estate Corp. v. *Subridge*, 139 Misc. 587, 248 N. Y. S. 663.

Another applicable line of New York cases relates to party walls.

In the first of these, *Cole* v. *Hughes*, 54 N. Y. 444, 13 Am. Rep. 611, a case many times cited and the authority

of which has never been challenged in New York, it was held, that where the owner on one side of a lot boundary erected a party wall, his right under a covenant by the adjoining owner to pay half the expense of erecting the wall when he used it was a purely personal right which passed to his assignee of such claim and not to his grantee of the land, a different person. It may be observed that this covenant to pay was, in effect, one for refund of money outlays made in connection with the erection of a building structure and with the mutual easements therein, the same as with the covenants to repay in the case at bar.

Among the New York cases in which *Cole* v. *Hughes* has been followed are:

Scott v. *McMillan*, 76 N. Y. 141;
Hart v. *Lyon*, 90 N. Y. 663;
Sebald v. *Mulholland*, 155 N. Y. 455, 50 N. E. 260 (which we shall later mention);
Crawford v. *Krollpfeiffer*, 195 N. Y. 185, 88 N. E. 29.

Hart v. *Lyon*, *supra*, like *Cole* v. *Hughes*, involved the question whether the benefit of an abutting owner's covenant to pay to the builder of a party wall one-half the cost thereof ran with the land. The covenantee (builder of the wall) lost her land by foreclosure of a mortgage thereon but assigned the benefit of the said covenant for the payment of money to the plaintiff. The Court of Appeals said that while a certain other covenant relating to the repair of the wall might be construed as running with the land, the covenant to pay one-half the cost of the wall "could not be so regarded", and the decision in favor of the plaintiff in that case was affirmed.

Also closely in point are cases of deposits made by

land developers with a public utility corporation or a municipality to obtain the installation of gas or water mains in the streets, repayable upon connection of houses with such mains. In these cases it has been held that the right to the refund is personal to the party who originally paid or deposited the money and does not run with the land. Such cases are:

Meado-Lawn Homes, Inc. v. *Westchester Lighting Co.*, 284 N. Y. 667, 30 N. E. 2d 608 (decided by the Court of Appeals in 1940 after the *Neponsit* decision and which will be hereinafter again mentioned).

Safe Deposit & Trust Co. of Baltimore v. *Baltimore-Gillett Co.*, 176 Md. 594, 12 Atl. 2d 208 (urged on the New York Court of Appeals in the said *Meado-Lawn Homes* case).

The foregoing cases of covenants to refund moneys in connection with lease deposits, party wall construction expenses and public utility mains are the cases which set forth the New York Law applicable to the case at bar.

Indeed, a right to the "refund" or "repayment" of moneys is something which, by the very meaning of the words, implies repayment to the particular person who originally made the payment (or his assigns of the chose in action). Refund means to pay back, thus implying that payment is to be made to the party from whom the fund was received.

Matter of Auditore, 278 N. Y. 234, 235, 15 N. E. 2d 593 (decided the same day as the *Neponsit* case with an opinion by the same judge);

City of Grand Rapids v. *Iosco Land Co.*, 273 Mich. 613, 263 N. W. 753;

3 Bouv. Law Dict. (Rawles 3rd Ed.) 2856.

Now the Circuit Court of Appeals has reversed the District Court in the case at bar upon the supposition that the applicable law of New York was changed by the Court of Appeals in 1938 by its decision in *Neponsit P. O. Assn.* v. *Emigrant Ind. Sav. Bk.*, 278 N. Y. 248, 15 N. E. 2d 793. The opinion of the majority of the Circuit Court of Appeals, in effect, admits that until the *Neponsit* decision, the New York courts invariably held that the right to receive money under a covenant to repay or refund money was a personal right, not running with the land. Thus, it is said in said majority opinion (R. 216):

> "It may be conceded that prior to the *Neponsit* case, the general attitude of the New York cases has been one of hostility to running covenants."

Again said opinion after dealing with the *Neponsit* case refers to "clear progress from authoritarianism to pragmatism" (R. 218) clearly implying such change by the *Neponsit* decision.

The question therefore is: Has the Court of Appeals made any such change in the New York law, and if so, does such change touch situations involving merely the right to receive refunds of money, such as in this case?

The majority of the Circuit Court of Appeals in holding, in effect, that the New York law has thus been changed by the *Neponsit* case has, we submit, misapprehended the effect of that decision. The *Neponsit* decision has been discussed quite fully upon the application of the petitioner to the Circuit Court of Appeals for a rehearing (R. 227-236). Briefly, that case related solely to the running of the burden of a covenant uniformly imposed in its deeds by the Neponsit Realty Company, the common grantor in a high class residential park development. By this covenant each grantee agreed, for himself, his heirs, successors and assigns, to make annual payments to the

grantor, or its assigns, towards the expense of the upkeep of the streets, parks, beaches, etc. in which all grantees and subsequent owners of the lots granted, had easements of common enjoyment, and such annual amounts, as they came due, were made liens on the lots. The plaintiff was a property owners association, provided for in the covenant itself, to which the Neponsit Realty Company had assigned all right to receive such annual payments. The defendant in that case, a subsequent grantee of one of the lots whose title was expressly subject to the said covenant, invoked the general rule that the burden of covenants to do affirmative acts, particularly to pay money, does not run with the land, but the Court of Appeals held against said defendant.

Exceptions to said general rule have always been recognized both in England and New York, such as covenants to repair fences on boundary lines, to repair private ways and certain covenants in leases, as appears in many New York decisions, particularly *Miller* v. *Clary*, 210 N. Y. 127, 132, 103 N. E. 1114, and *Guaranty Trust Co.* v. *N. Y. & Q. Co. Ry. Co.*, 253 N. Y. 190, 204, 170 N. E. 887. And when the *Neponsit* decision is analyzed, it will be seen that it constitutes merely one additional exception to that general rule. Said exception, in substance, is, that in such type of cases as the *Neponsit* case, in connection with residential developments, the very desirability of which would be destroyed if the streets, parks and beaches were not properly kept up, covenants of owners of lots to contribute to such upkeep necessarily run with the land.

The necessity for such an additional exception to said general rule had, earlier than the *Neponsit* decision, been recognized by the New York Appellate Division in *Lawrence Park Realty Co.* v. *Crichton*, 218 App. Div. 374, 218 N. Y. S. 278.

The Circuit Court of Appeals has apparently construed isolated statements in the *Neponsit* opinion, as indicating that said state court by that decision departed from the ancient rule of both English and New York law. Clearly, such conclusion was erroneous. This appears both by the comparatively recent decisions of the same court to which it referred and to which it gave emphatic endorsement in the *Neponsit* opinion, particularly *Miller* v. *Clary*, 210 N. Y. 127, 103 N. E. 1114; *Guaranty Trust Co.* v. *N. Y. & Q. Co. Ry. Co.*, 253 N. Y. 190, 170 N. E. 887, and *Morgan Lake* v. *N. Y., N. H. & H. R. R. Co.*, 262 N. Y. 234, 186 N. E. 685, and by the subsequent decision which we have mentioned, namely, the *Meado-Lawn Homes* case, 284 N. Y. 667, 30 N. E. 2d 608.

Reading these opinions and the references of the Court of Appeals in the *Neponsit* opinion to the prior ones, we clearly see that, instead of making any change in the general rule of New York that covenants to do affirmative acts and particularly to pay money are personal covenants, the court has reaffirmed that rule. And the *Neponsit* opinion shows that it was only with great hesitation and much labor that the Court of Appeals reached the conclusion that a new exception to the general rule should be recognized covering cases of covenants to contribute to the upkeep of common beneficial facilities in residential parks.

To refer briefly to said prior decisions:

In *Miller* v. *Clary*, 210 N. Y. 127, referred to on page 256 of the Neponsit opinion, it was held that a covenant by a grantor of mill property to construct and maintain a shaft, was an illustration of the general rule as to covenants to do affirmative or positive acts and did not run with the land.

In *Guaranty Trust Co.* v. *N. Y. & Q. Co. Ry. Co.*, 253 N. Y. 190, quoted on pages 256-257 of said *Neponsit* opinion, the Court held that a sweeping covenant, including after-acquired personal property in the coverage of a mortgage, did not reach or include a power house, car barn and street railway equipment acquired after the mortgage by a corporation which was a successor by merger to the mortgagor corporation.

And in *Morgan Lake Co.* v. *N. Y., N. H. & H. R. R. Co.*, 262 N. Y. 234, referred to on page 258 of said *Neponsit* opinion, involving a covenant by a railroad company, predecessor to the defendant company, to pay for damages caused by sparks, coal dust, etc., to the ice in a lake abutting the railroad, although Judge Crane thought that the situation was analogous to the anciently recognized exceptions to the general rule, as his own opinion indicates, other members of the Court did not share that view and the decision for the plaintiff was based solely upon the ground that the defendant corporation had assumed all the obligations of the predecessor, including the said covenant, the same as though it had been the original covenantor.

Each of the three last mentioned Court of Appeals cases dealt with a more difficult branch of the general rule than that involved in the case at bar, namely, the running of the burden of covenants to do affirmative acts and they did not involve rights to the benefits of such covenants. The approval by the Court of these cases shows that it did not intend to change the law even as to the running of the burden of such covenants.

That the Court of Appeals was not concerned in the *Neponsit* case with questions of the running of benefits is indicated by the fact that it did not mention the case of *Cashin* v. *City of New Rochelle*, 256 N. Y. 190, 176 N. E. 138, a case involving the running of the benefit of a

covenant to do an affirmative act where it was held that a successor owner—though of the same family—could not enforce a promise made in the original agreement granting a right of way for construction and maintenance of a sewer that "fences and grounds disturbed or removed by said parties * * * for any of the purposes aforesaid shall be restored to the same condition as found by" such parties.

The whole idea of the majority of the Circuit Court of Appeals that the New York Court of Appeals has changed the New York law by progressing "from authoritarianism to pragmatism" (R. 218) is based upon the language of Judge Lehman in the *Neponsit* decision approving the looking to the substantial effect of a covenant upon the legal relations of the parties as owners of the land rather than to mere form (*Neponsit* Opinion, p. 258), but Judge Lehman immediately goes on to say:

> "Perhaps the most illuminating illustration of such an approach to the problem may be drawn from the 'party wall' cases in this State which are reviewed in the opinion of the Court in *Sebald* v. *Mulholland*, 155 N. Y. 455."

The Court of Appeals thus indicated that in the *Neponsit* opinion it was not even suggesting a new method of approach to the problem, but merely following the method of approach in *Sebald* v. *Mulholland* and the other party wall cases, which included *Cole* v. *Hughes*, 54 N. Y. 444, and *Hart* v. *Lyon*, 90 N. Y. 663. There was, then, really nothing new in principle about the *Neponsit* decision, but only the recognition of a new exception to the general rule having not the remotest bearing upon the case at bar. And the fact that in the *Neponsit* case the Court of Appeals followed the method of approach of the party wall cases which, as we have shown, related to

the refund of money outlays, particularly makes it clear that the Court of Appeals had not the slightest idea that it was making any change in the law affecting the benefit of covenants to refund money.

This is strikingly established by the disposition by the Court of Appeals of the next case involving the running of covenants which came before it.

This was the case we have already mentioned of, namely, *Meado-Lawn Homes Inc.* v. *Westchester Lighting Co.*, 284 N. Y. 667, where the Court of Appeals, after granting the plaintiff a review by it, affirmed, although without opinion, the decisions of the Special Term and of the Appellate Division of the New York Supreme Court. The decision of the Special Term is reported at 171 Misc. 669, 13 N. Y. S. 2d 709. A full discussion of that case is contained in pages 228-233 of the record, having been embodied in our petition for a rehearing submitted to the Circuit Court of Appeals. The facts were, briefly, that deposits had been made by the defendant Bi-State Development Corporation, a land owner developing a residential tract, with the defendant Westchester Lighting Company to cover the cost of installing gas mains in the streets, and the Lighting Company covenanted to "refund" a stated amount of such deposits for each house erected, as and when connected with such gas mains.

The covenantee, the Development Corporation, conveyed practically all of the land remaining in 1937 to the plaintiff, which erected houses thereon, connected them with the gas mains and sued the defendant Lighting Company for the agreed refund, making the Development Corporation a party, and the latter claimed the refunds. The plaintiff in that case was thus much in the position of the respondent in the case at bar. But the Special Term held that the covenant to refund was personal only and that the moneys were to be refunded only to the

Development Corporation, the original covenantee, corresponding to the assignor of the petitioner herein, which was affirmed by the Appellate Division without opinion (259 App. Div. 810, 20 N. Y. S. 2d 396).

In that case the brief of the plaintiff in the Court of Appeals emphasized the *Neponsit* decision and asserted in effect that the position of the defendant Development Corporation amounted to an unwarranted narrowing of the *Neponsit* holding (R. 231), but the Court of Appeals disagreed with that contention and affirmed. It thus completely repudiated the theory of the majority of the Circuit Court of Appeals that under the *Neponsit* case the right of a covenantee to receive money to be refunded, in a situation like the case at bar, could be a right which ran with the land.

The Circuit Court of Appeals in its majority opinion in the case at bar cited the *Meado-Lawn Homes* case in 171 Misc. 669, as an example of the "hesitation—still true in the lower courts (of New York) even after the *Neponsit* case" in enforcing promises to pay money as running encumbrances and mentioned in a footnote the affirmance by the Court of Appeals in the *Meado-Lawn Homes* case (there cited as 284 N. Y. *99) (R. 217-218). But it seems to have wholly overlooked the fact that the *Meado-Lawn Homes* case is the latest decision of the Court of Appeals on the subject, rendered on facts closely analogous to those of the case at bar, and is decisive of the issues in this case, irrespective of the *Neponsit* decision.

The ultimate reason which seems to be assigned by the Circuit Court of Appeals for the reversal is that, upon the supposed warrant of the *Neponsit* case to apply pragmatic tests to the facts, it finds that

> "It was unreal to consider these refunds as a windfall payment for the benefit of persons having no

> present interest in the land rather than as a component part of a rather carefully thought out plan of land utilization" (R. 219).

It, in effect, finds that the provisions for refunds were intended to take the place of a covenant by the railway company to pay the expense of restoring the building in case of discontinuance of its connection with the elevated railway station (R. 219). Such finding of intent, we submit, is based on a mere surmise and not on anything in the agreement of 1907 which justifies such an inference.

No issue as to the intent of the parties to said agreement with reference to the refunding covenants was litigated or even suggested before the Special Master nor in the exceptions filed to the Master's Report. This situation was called to the attention of the Court below in our petition for rehearing, and it was then explained that had any such issue arisen at the trial, a witness for City Investing Company who participated in the drawing of said agreement of 1907 would have been available to testify upon any question of intent (R. 236).

It does appear by the record that in 1914, upon the conveyance of the building from the original owner and covenantee, Broadway-Cortlandt Company, a subsidiary of City Investing Company, to the latter under a formal contract of sale, the said parties treated the right to the $10,000 refund as a mere chose in action, transferred by mere entries upon the books of both corporations and a thing which did not require any mention in the deed as a realty matter (R. 158-167). This practical construction of the agreement of 1907 by the original owner and its parent grantee of the right to receive back the moneys as one not passing with the land, coming only seven years after the original contract, is entitled to great weight. The omission of City Investing Company to pay its said grantor by book credit anything for the right to

refund of the construction costs ($13,557.15) is of no significance because in 1914 no one could have contemplated the demolition of the elevated railway; while, on the other hand, the discontinuance at some time thereafter of the connection between the railway and the building and consequent release of the $10,000 deposit for ticket chopper expense was not at all unlikely. And both of the claimants to this refund, petitioner and the respondent herein, upon the trial before the Special Master, claimed the $10,000 as a trust fund held by the Railway Company (R. 34) although the Railway Company denied the trust feature and succeeded upon that one issue. This idea of a trust fund, asserted by both the instant parties, was, we submit, consistent only with the view that the right to recover the $10,000 was a chose in action, and not something which followed the land from one owner to another.

Great stress is laid by the majority of the Circuit Court of Appeals upon the intent of the parties with respect to the 1907 agreement. It is a general rule of law that parties to contracts are, in the absence of any overwhelming evidence to the contrary, presumed to make their contracts in accordance with existing rules of law. At all times down to at least the *Neponsit* decision in 1938, as is admitted by said opinion, the New York law was strongly to the effect that agreements to do affirmative acts, including the payment of money, were purely personal covenants and could not run with the land even though the parties may have desired the contrary. The cases of *Cole* v. *Hughes*, 54 N. Y. 444; *Hart* v. *Lyon*, 90 N. Y. 663, and *Sebald* v. *Mulholland*, 155 N. Y. 455, 50 N. E. 260 (1898), had laid down the rule, particularly as to the benefit of covenants to pay money, prior to the 1907 contract. The case of *Crawford* v. *Krollpfeiffer*, 195 N. Y. 185, 88 N. E. 29, had applied this rule in the

year 1909. The case of *Miller* v. *Clary*, 210 N. Y. 127, 103 N. E. 1114, had in 1913—one year prior to the assignment of the chose in action by Broadway-Cortlandt Company to petitioner—again reaffirmed this rule. In 1930 the *Guaranty Trust Co.* case, 253 N. Y. 190, 170 N. E. 887, and in 1933 the *Morgan Lake Co.* case, 262 N. Y. 234, 186 N. E. 685—both subsequent to the 1926 deed and mortgage involved in Point II following—had again reiterated the rule. Accordingly, there was at no time during the period involved any doctrine recognized by the Court of Appeals justifying the inference that the parties here in question intended—as the Circuit Court of Appeals has proclaimed—that the covenants to repay moneys should run with the land as a part of a plan for the development of the land.

POINT II.

The decision of the lower Court is in conflict with the law of the State of New York, as established by its highest court, that respondent was chargeable with notice of the complete and effective reservation by petitioner of all rights to receive repayment of the moneys from the Railway Company.

In order to sustain its decision it was necessary for the court below to dispose of the question of actual or constructive notice as a bar to respondent's claim.

This means that the court below has held, contrary to the Special Master, that the respondent was not chargeable with either actual or constructive notice, despite the proof presented to the Special Master to the effect that

(a) Petitioner expressly reserved its rights in the contract of sale of 1919 (R. 44);

(b) The deed, recorded on the same date as the mortgage through which respondent derives title, recites that such owner and mortgagor had acquired the premises "subject to * * * unrecorded agreements affecting said real estate * * *" (R. 44);

(c) The recorded agreement consolidating the mortgages through which respondent derives title expressly limited the rights of the mortgagee by the phrase

> "Subject, however, * * * to agreements relating to maintenance of elevated station * * *" (R. 193).

The use of the plural "agreements" indicates, necessarily, an agreement other than the original agreement of 1907; and

(d) That Grigori Benenson, the same individual who executed with petitioner the contract of 1919 in which petitioner's right to receive payment of the moneys in question was expressly reserved, was also the President of Benenson Building Corporation, which executed the mortgage and consolidation agreement through which respondent derives title,

and despite the absence of any proof by respondent affirmatively showing that it had acquired the premises in question without notice, actual or constructive, of petitioner's prior rights.

Upon such state of the record it was incumbent upon the court below to follow the holding of the Special Master and of the District Court, and to apply the New York law with respect to the question of notice, actual or constructive, as invalidating the rights of a subsequent grantee under the recording act (New York Real Property Law, Sec. 291), in this case the respondent. The New York law as to notice is a long established rule of property in that State, as laid down by its highest court, and

repeatedly affirmed. In *Sweet* v. *Henry*, 175 N. Y. 268 (1903) at page 276, 67 N. E. 574, the New York Court of Appeals stated the rule as follows:

> "The rule of law is well settled that a recital in a deed forming a link in the chain of title of any facts which should put a subsequent grantee or mortgagee upon inquiry and to cause him to examine other matter by which a defect in the title would be disclosed, is constructive notice of such defect.
>
> Where a purchaser of land has knowledge of any facts sufficient to put him on inquiry as to the existence of some right or some title in conflict with that which he is about to acquire, he is presumed either to have made the inquiry and ascertained the extent of such prior right, or to have been guilty of a degree of negligence equally fatal to his claim to be considered as a bona fide purchaser."

The rule of *Sweet* v. *Henry, supra*, is of ancient origin in the State of New York and is still the law of that State. It is recognized in the following decisions prior to *Sweet* v. *Henry*.

> *Williamson* v. *Brown*, 15 N. Y. 354;
> *Acer* v. *Westcott*, 46 N. Y. 384, 7 Am. Rep. 355;
> *McPherson* v. *Rollins*, 107 N. Y. 316, 14 N. E. 411;
> *Anderson* v. *Blood*, 152 N. Y. 285, 46 N. E. 493.

This rule has been repeatedly referred to in decisions of the New York courts since the decision in *Sweet* v. *Henry, supra*, as appears from the following cases:

> *Green* v. *Horn*, 207 N. Y. 489, 495, 101 N. E. 430;
> *Tuscarora Club* v. *Brown*, 215 N. Y. 543, 547, 109 N. E. 597;
> *McKenna* v. *Brooklyn Union Elev. Ry. Co.*, 95 App. Div. 226, 231, 88 N. Y. S. 762; rev'd on other grounds, 184 N. Y. 391, 77 N. E. 615;

Ebling Brewing Co. v. *Gennaro*, 189 App. Div. 782, 786, 179 N. Y. S. 384;

Barber v. *Rowe*, 200 App. Div. 290, 297, 193 N. Y. S. 157, aff'd 235 N. Y. 549, 139 N. E. 730;

BelleAyre Conservation Co. v. *State of New York*, 214 App. Div. 127, 132, 211 N. Y. S. 641; aff'd 264 N. Y. 593, 159 N. E. 665, cert. den. 277 U. S. 591, 72 L. Ed. 1003.

See also application of this rule in summary proceedings affecting a portion of the very premises in question, in *165 Broadway Realty Co. Inc.* v. *Weber & Heilbroner*, 143 Misc. 672, 256 N. Y. S. 805, aff'd without opinion 238 App. Div. 837, 263 N. Y. S. 935.

It thus appears that the rule of *Sweet* v. *Henry, supra*, is so much an established rule of property in the State of New York that conveyancers must be considered to act with reference thereto and that proper application of the rule in this case would require an affirmance of the order of the District Court in favor of petitioner.

As a subsidiary ground, which would not by itself entitle petitioner to review, it is pointed out that the decision of the Circuit Court of Appeals in this case is contrary to the rule of constructive notice, as enunciated not only by that Court but by the U. S. Supreme Court in the following cases:

The Tompkins, 13 Fed. (2d) 552; C. C. A. 2nd (1926);

Simmons Creek Coal Co. v. *Doran*, 142 U. S. 417, 35 L. Ed. 1063;

Stanley v. *Schwalby*, 162 U. S. 255, 40 L. Ed. 960.

The Circuit Court of Appeals has also held (R. 222) that under the law of the State of New York the right of

petitioner to the moneys in question could not be effectively reserved on the ground that a running covenant may not be turned into one in gross without the consent of the servient owner. Such conclusion results from misconception by the Circuit Court of the New York law in the following respects:

Obviously, if the court below had properly applied the New York law so as to hold that the covenant in question, being personal, did not run with the land and could, therefore, be reserved or assigned without reference to the land, as argued under Point I, the question of the effect of the reservation would not need to be decided, as the New York law on that point alone would resolve the decision in favor of petitioner.

However, the court below, after erroneously holding that the right to receive the money in question ran with the land, held petitioner's reservation ineffective through misapplication of the New York law, as stated in the cited case of *McKenna* v. *Brooklyn Union Elev. R. R. Co.*, 184 N. Y. 391, 77 N. E. 615, and related cases (R. 222). That case holds that easements of light, air and access, being appurtenant to real property, are inseparable from the dominant estate and the right to damages for invasion or destruction thereof cannot be effectively reserved upon a grant of the fee. Such cases can have no application to the situation here involved, namely, the right to receive a sum of money subsequent to the time when all connection between the elevated railway and the building had been completely terminated, so that absolutely no question of separability of easements or of rights thereunder is involved.

Moreover, bearing in mind the fact that the right of the Railway Company to receive payment is not here involved (R. 212), and that both parties claiming the funds are before the equity court, and that the Railway Com-

pany is willing to pay the funds to the party determined to be entitled thereto, we find that the New York law establishes petitioner's right to the moneys even though the covenant ran with the land and even though it could be said to involve separability of easements from the fee. Thus, in *Drucker* v. *Manhattan Railway Co.*, 213 N. Y. 543, 108 N. E. 74, the New York Court of Appeals has held that where the railroad was obliged, as here, either by agreement or by adjudication, to pay the person entitled thereto, the prior owner who has expressly reserved the right to such payment, as against a subsequent grantee having notice or chargeable with notice of such reservation, is entitled to receive payment on the basis of the equitable principles set forth in that case.

To the same effect see:

Western Union Tel. Co. v. *Shepard*, 169 N. Y. 170, 62 N. E. 154;

Schomacker v. *Michaels*, 189 N. Y. 61, 81 N. E. 555;

McKenna v. *Brooklyn Union Elev. Ry. Co.*, 184 N. Y. 391, 77 N. E. 615;

Pegram v. *Elevated Railroad Co.*, 147 N. Y. 135, 41 N. E. 424;

Dunlop v. *Sweet Bros. Paper Mfg. Co. Inc.*, 211 App. Div. 363, 208 N. Y. S. 54;

Freund v. *Biel*, 114 App. Div. 400, 99 N. Y. S. 1067, affd. 193 N. Y. 662, 87 N. E. 1119;

Trustees of Mission Church v. *Ridley*, 167 App. Div. 392, 396, 152 N. Y. S. 745;

Matter of City of New York (*Man. R. Co.*), 126 Misc. 879, 902, 216 N. Y. S. 2, mod. other grounds 229 App. Div. 617, 243 N. Y. S. 665, affd. 295 U. S. 264, 79 L. Ed. 1429, approved 265 N. Y. 170, 192 N. E. 188.

The case of *Maurer* v. *Friedman*, 197 N. Y. 248, 90 N. E. 814, in which the subsequent grantee was held entitled to payment, is not in point here as the decision turned upon the express provision in the recorded instrument to the effect that the reservation should "not be construed in any manner as a lien or encumbrance or binding or affecting said demised premises", and consequently was not intended as a reservation binding remote grantees.

POINT III.

The decision of the lower Court is also in conflict with the long standing rule of law in New York State, as established by its highest court, that a subsequent grantee, in order to rely upon the protection of the Recording Act, must sustain the affirmative burden of proving that he is a purchaser in good faith and without notice.

The Circuit Court of Appeals has held (R. 221-222) that 165 Broadway Building, Inc. had neither actual nor constructive notice of petitioner's reservation of right to receive payment of the funds in dispute. The Special Master in his report, based upon the evidence before him, found (R. 44-45) that inquiry by 165 Broadway Building, Inc. would have disclosed petitioner's reservation and that petitioner had effectively reserved the right to receive payment of the funds in dispute (R. 49). There is no finding or proof or offer of proof to the effect that 165 Broadway Building, Inc. has sustained the affirmative burden of showing that it was a bona fide purchaser without notice. Under such circumstances the decision of the Circuit Court of Appeals is in conflict with the rule laid down by the New York State courts to the effect that a subsequent purchaser relying on the recording act must affirmatively plead and show

that he is a bona fide purchaser without notice of prior rights of others, even under unrecorded instruments.

In *Flickinger* v. *Glass*, 222 N. Y. 404, 118 N. E. 792, involving the question as to superiority of a vendee's lien over the rights of a subsequent mortgagee, Judge Cardozo said at page 410:

> "Even though there was no fraud the mortgage yields to the lien unless it was taken without notice, actual or constructive, of the rights of the vendee; and the burden of proof is with the defendants to show that notice was lacking."

In *Hood* v. *Webster*, 271 N. Y. 57, 59, 2 N. E. (2d) 43, the New York Court of Appeals said:

> "We think this question of burden of proof as fixed by the recording act is not for us an open one. The defendants were bound to make out, by a fair preponderance of the evidence, the affirmative assertion of their status as purchasers in good faith and for a valuable consideration. *Westbrook* v. *Gleason*, 79 N. Y. 23; *Ten Eyck* v. *Witbeck*, 135 N. Y. 40; 31 N. E. 994; 31 Am. St. Rep. 809; *Lehrenkrauss* v. *Bonnell*, 199 N. Y. 240, 243; 92 N. E. 637."

That this has been the rule in New York State from the very earliest times down to the present is shown by the following:

Gallatian v. *Cunningham*, 8 Cowen 361, at page 374;
Denning v. *Smith*, 3 Johns Ch. 332;
Murray v. *Ballou*, 1 Johns Ch. 566, at 575;
Simpson v. *Del Hoyo*, 94 N. Y. 189 at 194;
Seymour v. *McKinstry*, 106 N. Y. 230, 240, 12 N. E. 348, 14 N. E. 94;

Ochenkowski v. *Dunaj*, 232 App. Div. 441, 443 *et seq.*, 251 N. Y. S. 589.

Conclusion.

The principles of New York Law discussed in the preceding points, involving as they do local rules of property affecting titles to real estate and conveyancing practice in the State of New York, it is submitted that the failure of the court below to apply the law of the State of New York in the determination of the issues here involved will tend to create great confusion in the law and in titles to property situated in New York State, and that such important considerations justify the granting of petitioner's application for a writ of certiorari.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers by granting a writ of certiorari and thereafter reviewing and reversing the said decision of the Second Circuit Court of Appeals.

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Supreme Court of the United States

OCTOBER TERM 1941

No. 675

AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Plaintiff,

against

INTERBOROUGH RAPID TRANSIT COMPANY,
Defendant.

Application of City Investing Company and 165 Broadway Building, Inc. re Preferred or Trust Claims against the Defendant and/or its Receiver.

CITY INVESTING COMPANY,
Petitioner,

against

165 BROADWAY BUILDING, INC., and
THE CITY OF NEW YORK,
Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

LEONARD G. BISCO,
Counsel for Respondent,
165 Broadway Building, Inc.

DAVID BARNETT,
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Supreme Court of the United States

OCTOBER TERM 1941

No. 675

AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Plaintiff,

against

INTERBOROUGH RAPID TRANSIT COMPANY,
Defendant.

Application of City Investing Company and 165 Broadway Building, Inc. re Preferred or Trust Claims against the Defendant and/or its Receiver.

CITY INVESTING COMPANY,
Petitioner,

against

165 BROADWAY BUILDING, INC., and
THE CITY OF NEW YORK,
Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Facts

The petition for a writ of certiorari and the brief in support thereof are incomplete in their statements of the facts. The facts are correctly and more fully set forth in the majority opinion of the Circuit Court of Appeals reported in 120 F. (2d) 813. 165 Broadway Building, Inc., herein-

after referred to as respondent, was the owner of 165 Broadway when the adjacent railway station and connecting bridge were demolished on April 4, 1939; therefore it sustained the damage caused by such demolition. At the time it acquired title, in 1938, it received the original contract made in 1907 between the Railway Company and the then owner of said building, and it produced said original contract at the hearings before the Special Master (R. 125-126, 154-155).

Jurisdiction of This Court

It has been held by the United States Supreme Court that jurisdiction to review by certiorari will be sparingly exercised, and only in cases of peculiar gravity and general importance, or in cases affecting relations with foreign governments, or to secure uniformity of decisions. *In re Woods*, (1892) 143 U. S. 202; *American Construction Co.* v. *Jacksonville, T. & K. W. Ry. Co.*, (1893) 148 U. S. 372; *U. S.* v. *Rimer*, (1911) 220 U. S. 547.

Petitioner relies upon paragraph 5 of Rule 38 of the Rules of the United States Supreme Court, which, insofar as applicable, reads as follows:

> "5. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered: * * *
>
> (b) Where a circuit court of appeals * * * has decided an important question of local law in a way probably in conflict with applicable local decisions; * * *"

Summary of Argument

Respondent contends:

1. This case does not involve important questions of local law.

2. The decision of the Circuit Court of Appeals herein is not in conflict with applicable local decisions.

POINT I

This case does not involve important questions of local law.

It is undisputed that the general principles of law which determine whether a covenant runs with the land under New York law are set forth in *Neponsit Property Owners Association* v. *Emigrant Industrial Savings Bank,* 278 N. Y. 248 (1938).

Referring to this decision, the Special Master who decided in favor of the petitioner, stated (R. 45):

> "In *Neponsit Property Owners Association* v. *Emigrant Industrial Savings Bank,* 278 N. Y. 248, the Court of Appeals enumerates at page 255 the essentials necessary to constitute an ordinary covenant, one that runs with the land:
>
> '(1) It must appear that the grantor and grantee intended that the covenant should run with the land; (2) it must appear that the covenant is one "touching" or "concerning" the land with which it runs; (3) it must appear that there is "privity of estate" between the promisee or party claiming benefit of the covenant and the right to enforce it, and the promisor or party who rests under the burden of the covenant'."

We quoted the above at the opening of our argument in our brief before the Circuit Court and then added:

> "We agree with the foregoing excerpt and contend that the covenants contained in the 1907 agreement fulfilled the three essential requirements enumerated therein."

Judge Lehman, who wrote the opinion in the *Neponsit* case, cited in support of his said conclusions Clark on *Covenants and Interests Running with Land,* page 74, a volume written by the learned Judge who wrote the majority opinion below.

The only question involved herein is as to the application of the general principles enunciated in the *Neponsit* case, and which are undisputed, to the specific agreement set forth at pages 176-185 of the record.

This question is of no great importance to anyone other than the parties hereto.

POINT II

The decision of the Circuit Court of Appeals is not in conflict with applicable local decisions.

The majority opinion of the Circuit Court herein refers to the three essentials of a real covenant running with the land as outlined in the above quotation from the *Neponsit* case and in Clark on *Covenants and Interests Running with Land,* page 74. Each of these three essentials is then discussed separately and the conclusion is reached: "We think this agreement is within the spirit and letter of the Neponsit rule as a running covenant." 120 F. (2d) 813, at 819 (R. 220, fol. 659).

1. The parties intended that the covenants should run with the land. This point was covered by Clark, J., in his opinion at R. 213-214. He held that the parties made their intent clearly manifest not only in paragraphs Tenth, Fif-

teenth and Sixteenth, but also in "the whole tenor of the complete document."

The 1907 agreement (R. 176) was made with Broadway-Cortlandt Company in no other capacity than as the owner of 165 Broadway. It was intended to benefit it as such owner. It paid to the Railway Company $23,557.15 because it believed that the direct connection between the railway station and 165 Broadway would enhance the value of its building. Since the contract was entered into for the purpose of benefiting the building, it necessarily follows that the parties then believed that if the connection between the building and the railway station was demolished and the contract terminated, the owner would suffer a loss to its building (1) because of its cost in repairing the physical damages to the property and (2) by reason of losing the benefits of the contract. The Railway Company apparently insisted upon inserting paragraph Ninth (R. 181) that it would be under no obligation, under any circumstances, to restore or rebuild any wall or other structure of the owner, or to pay therefor unless damaged by its negligence. The owner, therefore, insisted upon the clauses in paragraphs Tenth and Eleventh so that if the connection between the railway station and the building were demolished, the amounts paid by the owner to the Railway Company would be repaid. Paragraph Tenth provides that it would be repaid "to the Owner, its successors or assigns". Paragraph Eleventh provides for repayment "to the Owner". Wherever the word "Owner" is used throughout this contract it is clear it meant the owner at the time a right or duty accrued under a particular covenant.

Assume, for example, that the Railway Company, after having done some of the work required by the contract, called upon the owner of 165 Broadway to pay its share of the cost of construction, and suppose in the meantime the property had been transferred to a new owner? It clearly was the intention that the then owner would be obligated to pay the amount required by said contract.

In paragraph Eleventh the "Owner" agreed to pay to the Railway Company $10,000 in cash as and for the cost of providing one ticket chopper and the additional sum of $10,000 in cash if the Railway Company deemed it necessary to have two ticket choppers. Suppose after the property was transferred the Railway Company demanded an additional $10,000 for another ticket chopper. Can there be any question but that the word "Owner" as used here and throughout the agreement meant the "owner" at the time when the covenants were to be performed?

Paragraph Eleventh further provided that in case said agreement should at any time be terminated and the connection between the building and the railroad structure be discontinued, the sums so paid to the Railway Company by the "Owner" should be repaid by the Railway Company to the "Owner". This could not mean only the Broadway-Cortlandt Company since a subsequent owner might have made one of the payments provided for by the agreement. Clearly the owner at any particular date was entitled to the benefits and subject to the burdens of said agreement.

2. There was privity of estate between respondent and the Railway Company. This point is covered by the Circuit Court in its opinion at R. 214-215.

The 1907 contract immediately created a privity of estate between the owner of 165 Broadway as owner and the Railway Company. Each was granted mutual easements until such easements were destroyed in accordance with the terms of said contract. The right of the Railway Company to have access to and from the building at 165 Broadway for itself and its prospective passengers, as well as its right to have a ticket office, or its equivalent, and to have the premises maintained in a proper condition, and the right of the owner to have the bridge maintained, all constituted easements and established privity of estate between the Railway Company and the owner of 165 Broadway.

As said by Clark, J. (R. 215):

> "Whatever be the correct doctrine, we have here all the requirements which have been enforced under any version of the rule. For, as the cases uniformly hold, the creation or continuance of easements, as here for the use of the premises in question, affords all necessary privity and supports the accompanying covenants. *Nye* v. *Hoyle,* 120 N. Y. 195, 203, 24 N. E. 1, 3; *Morehouse* v. *Woodruff,* 218 N. Y. 494, 501, 113 N. E. 512; *Hazlett* v. *Sinclair,* 76 Ind. 488; *Morse* v. *Aldrich,* 19 Pick., Mass., 449; Tiffany, op. cit. §853; Clark, *Covenants,* 96 et seq., 109 et seq."

3. The covenants in question touch or concern the land. This point is covered in the opinion of Clark, J., at R. 215-220. The covenants of the Railway Company to make such payments touch and concern the land in three ways:

1. They are in effect a right given to the Railway Company to terminate the easements which touch and concern the land upon condition that the Railway Company pay a sum of money upon the exercise of such option.

2. They are in effect an agreement by the Railway Company to pay a sum of money in lieu of repairs to the building.

3. They are in effect a covenant by the Railway Company to pay a sum of money as compensation to the owner of the building for damages to his property because of the loss of the mutual easements.

The 1907 contract was intended to benefit the building and to provide some compensation to the owner of the building as a condition to terminating such benefits and as compensation therefor.

Clark, J., in his opinion pointed out (R. 219):

> "Mutuality of obligation and of right was secured by the plan (which the parties, as we have seen, conceived of as freely running); it would be destroyed

on appellee's contention when the refund goes to a stranger while the owner has to restore its building with a hole in its front and without assistance from anyone."

In *Avery* v. *New York Central & Hudson River Railroad Co.*, 106 N. Y. 142, one owning hotel property conveyed land in 1857 to a railroad company for the purpose of a railroad depot only, and the deed provided that the conveyance was made on the express condition that the grantee, its successors or assigns, should at all times maintain an opening into the premises conveyed, opposite to the hotel, for the convenient access of passengers and baggage to and from the premises conveyed, which opening should at no time be closed (p. 148). In 1881 the defendant erected a fence which prevented access between the depot and the hotel property. In 1887 a subsequent owner of the property leased the hotel to the plaintiff, who brought an action to enjoin the continuance of such fence. The court held that the provision in the 1857 deed, whereby the railroad company agreed to maintain an opening between the depot and the hotel "was for the benefit of the hotel property" (p. 154) and therefore inured to the benefit of a subsequent owner and his lessee, stating (p. 155):

"It was intended to be an agreement or covenant between the parties running with the land, providing for this access or right of way so as to continue or enhance the value of the hotel property by providing for such easy access to it from defendant's depot for passengers and baggage. (See Stanley v. Colt, 5 Wall. 119; Countryman v. Deck, 13 Abb. N. C. 110.)"

On page 155, the court stated:

"The grantors in these deeds were also the owners of the hotel property, and the easement provided for in the deeds for the transit of passengers and their baggage over this twenty feet must be construed as reserved not for the benefit of such passengers in any sense, but as an easement reserved for the benefit and in favor of the grantors being owners of the remaining

> hotel property, and as appurtenant to it, and fairly necessary for its full and proper enjoyment. It, therefore, runs with the hotel property and in favor of its owner or lessee the latter of whom has such an interest in its existence as courts will recognize and protect."

So in the case at bar the covenants provided for in the 1907 agreement for the benefit of the building at 165 Broadway were intended to and did run with the land and could be enforced by a subsequent owner.

Accord: *Post* v. *West Shore R.R. Co.*, 123 N. Y. 580; *Aikin* v. *Albany, V. & C. R.R. Co.*, 26 Barb. 289; *Countrymen* v. *Deck*, 133 Abb. N. C. 110.

A covenant to repair may run with the land. *Nye* v. *Hoyle*, 120 N. Y. 195; *Morehouse* v. *Woodruff*, 218 N. Y. 494, 501; *Levy* v. *Schnurmacher Construction Corp.*, 255 N. Y. 83, 86; *Greenfarb* v. *R. S. K. Realty Corp.*, 256 N. Y. 130; *Silberberg* v. *Trachtenberg*, 58 Misc. 536, 109 N. Y. S. 814; *Bruder* v. *Crafts & D. Co.*, 79 Misc. 88, 139 N. Y. S. 307.

Clearly, had the Railway Company covenanted that in the event of the demolition of the station it would have repaired the building at 165 Broadway, under the authorities above set forth, such a covenant would have run with the land and would have inured to the benefit of the owner at the time when the demolition occurred.

In *Greenfarb* v. *R. S. K. Realty Corp., supra*, a covenant to maintain a private road was held to run with the land. The court discussed different types of covenants running with the land, including (at p. 134) "covenants by a railroad to maintain overhead crossings over its right of way for the benefit of adjoining owners who granted the easements in part (*Aiken* v. *Albany, etc., R.R. Co.*, 26 Barb. 289; *Post* v. *West Shore R.R. Co.*, 123 N. Y. 580)." A covenant by a railroad company to maintain crossings and to issue passes to the grantor of an easement runs with the land. *Monroe* v. *Syracuse, etc.*, 220 N. Y. 224 (1910). A covenant by a railroad company to pay damages for sparks, cinders,

etc., runs with the land. *Morgan Lake Company* v. *New York, New Haven, etc.,* 230 A. D. 356, 245 N. Y. S. 146, s. c. 262 N. Y. 234.

A covenant to pay for repairs to real property may run with the land. *Lawrence Park Realty Co.* v. *Crichton,* 218 A. D. 374, 218 N. Y. S. 278; *Kennilwood Owners Assn.* v. *Jaybro R. & D. Co.,* 156 Misc. 604, 281 N. Y. S. 541; *Neponsit Property Owners Assn.* v. *Emigrant Industrial Savings Bank, supra.*

Since a covenant to repair, or pay for repairs, to real property may run with the land, it naturally follows that a covenant to pay money in lieu of such repairs is a covenant running with the land.

The covenant in the 1907 contract by the Railway Company to refund certain payments to the owner was in lieu of the agreement of the Railway Company to restore or rebuild the wall of the owner. It was the owner at the time of the demolition who sustained the damages caused by the removal of the structure, and it is such owner who in all justice and equity is entitled to the benefits of the covenant made by the Railway Company in lieu of repairing said wall.

Had the Railway Company agreed, upon the demolition of the structure, to repair the wall of 165 Broadway, there could be no doubt that under the decisions such covenant would be deemed a covenant running with the land. Suppose the Railway Company agreed that it would not only repair the wall but would also pay a sum of money to the owner of 165 Broadway to enable it to repair and repaint the corridor leading to the former entrance to the railway station? Could it be contended that the covenant to repair would run with the land while the covenant to pay a sum of money to enable the owner to repair the corridor did not run with the land?

In effect the 1907 contract contemplated that the owner would make all repairs to its building in the event of a demolition of the railway station and as compensation to it for losing the benefit of the contract and making such

repairs it would receive repayment of the amounts previously paid to the Railway Company. We submit that the Circuit Court was correct in holding that such a covenant touches and concerns the building which is part of the real estate owned by respondent.

In order to recover the amount claimed herein, it was necessary for both claimants to plead and prove performance of the covenants in the 1907 agreement to be performed on the part of the owner (fols. 212, 200). The Receiver denied performance (fols. 74, 83), claiming that the owner had failed to furnish a ticket agent for the sale of the tickets as provided for in paragraph Eleventh of the 1907 agreement (fol. 543). At the trial, the claimants showed that in lieu of supplying a ticket agent, tickets were sold by McBride in the arcade (fols. 387-388) and that this was satisfactory to the Railway Company. Naturally, it was necessary to show performance not only on the part of Broadway-Cortlandt Company and City Investing Company but also by subsequent owners (R. 122).

Nevertheless, the proof shows that after it ceased to be the owner on June 30, 1920, the City Investing Company took no steps to see that the 1907 contract was being performed, and lost all interest in the matter (R. 128-129).

The Special Master stated:

> "The record shows, however, that the Broadway-Cortlandt Company *and its successors in title right up to the time of the condemnation and demolition of the railroad* provided a substitute arrangement for the sale of said railroad tickets in the said arcade or corridor. This substitute arrangement apparently satisfied the defendant since throughout the thirty years that followed, the practice adopted by Broadway-Cortlandt Company *and its successors in title* with respect to the sale of railroad tickets was accepted by the defendant as a satisfactory compliance with the agreement" (R. 28; italics ours).

It was because the 1907 contract was performed by the Broadway-Cortlandt Company "and its successors in title right up to the time of the condemnation and demolition of the railroad" that the Special Master allowed the claims and overruled the contentions of the Railway Company as to alleged non-performance.

Meado-Lawn Homes, Inc. v. *Westchester Lighting Co.*, 171 Misc. 669, 13 N. Y. S. (2d) 709, aff'd 259 A. D. 810, 20 N. Y. S. (2d) 396, aff'd 284 N. Y. 663, was considered and cited in both the majority and minority opinions in the Circuit Court of Appeals. It quotes and follows the principles of the *Neponsit* case and merely holds that the particular agreement involved therein did not comply with any one of the three essentials for covenants running with the land enumerated in the *Neponsit* decision. The facts in the case at bar are clearly essentially different.

4. The 1907 contract could not be modified without the consent of the Railway Company. If we are correct in our contention that the 1907 agreement ran with the land, and that the burdens were binding upon and the benefits inured to the benefit of subsequent owners, it would follow that the promise of the Railway Company to make repayment was a promise to make such repayment to the person who was the owner at the time the demolition took place. Such a promise could not be modified without obtaining the express approval of the Railway Company. It is elementary that a modification of a contract cannot be made ex parte by one of the parties thereto. As pointed out by Clark, J. (R. 222):

> "Had notice been shown, there would still have remained the question whether or not a running covenant may be turned into one in gross without the consent of the servient owner. Such a serious change in the nature of the encumbrance has not been recognized with respect to easements and profits, *McKenna* v. *Brooklyn Union Elevated R. Co.*, 184 N. Y. 391, 77 N. E. 615; *McCullough* v. *Broad Exch. Co.*, 101 App. Div. 566, 92 N. Y. S. 533, affirmed 184 N. Y. 592, 77 N. E. 1191;

18 Harv. L. Rev. 608; 20 Harv. L. Rev. 136; Clark, *Covenants,* 69, 70, though the rule seems otherwise as to rents; *Demarest* v. *Willard,* 8 Cow. N. Y. 206; *Morehouse* v. *Woodruff, supra;* Clark, *Covenants,* 170. These covenants are so intimately connected with the maintenance and use of the property for the purposes contemplated by the covenanting parties that they would appear more like the easements they accompany than a simple obligation to pay rent. Compare *McCullough* v. *Broad Exch. Co., supra,* where the covenants went with the easements."

5. The attempted reservation of petitioner in an unrecorded contract of sale did not affect the rights of the respondent. When the petitioner City Investing Company acquired title in 1914, it did not at that time obtain any formal assignment by Broadway-Cortlandt Company of its rights to the 1907 contract (R. 88, 165, 158-159). Evidently, City Investing Company at that time believed that the covenants in the 1907 contract ran with the land and that, therefore, no formal assignment of the contract was necessary.

In 1920, it conveyed the premises to G. Benenson Investing Company, Inc. by a deed containing a covenant (R. 173) that it had not done or suffered anything whereby the said premises have been encumbered in any way whatsoever, except as stated, but the deed contained no reference to the 1907 contract.

It now appears that by the contract of sale which preceded said deed, the City Investing Company attempted to reserve the right to receive such payments from the Railway Company. This contract of sale was never recorded. In 1920 the possibility of a repayment from the Railway Company was exceedingly remote. By failing to incorporate said reservation in the recorded deed, the City Investing Company must have intended to abandon such reservation or to waive it with respect to subsequent grantees. It was as if the parties had stipulated that the reservation was to be binding only between the parties and not upon subsequent purchasers. Therefore, the case of

Maurer v. *Friedman,* 197 N. Y. 248, is in point. There it was held that a reservation in a recorded deed to a grantor of damages for injury to an easement with a statement that it should not become a lien upon the property was not binding on subsequent grantees. In the case at bar, the failure to include the reservation in the recorded deed, was equivalent to an agreement that such reservation should not constitute a lien on the property. Therefore, it was not intended as a reservation binding remote grantees.

Foote v. *Metropolitan Elevated Railway Co.,* 58 Hun 478, 12 N. Y. S. 516, 70 Hun 598, 24 N. Y. S. 1140, aff'd 147 N. Y. 367, was an action to restrain the elevated railway company from operating its railway until it acquired title to the street easements by condemnation and to recover damages for injury to plaintiff's abutting property. Plaintiff acquired title to the fee by a deed from Messrs. Gillie & Walker, who in turn were grantees of one Lathrop. Prior to his sale Lathrop had commenced action against the elevated railway company for damages caused to his property. In his contract of sale with Gillie & Walker, Lathrop reserved the right to such damages. This instrument was never recorded. No mention was made of this reservation in Lathrop's deed to Gillie & Walker, nor in the deed given by them to the plaintiff. The Court of Appeals affirmed a judgment on behalf of plaintiff against the elevated railway company. The defendant claimed to have purchased the easements used by them from Lathrop by reason of having settled his action against them. This claim was rejected by all the courts. Said the General Term for the First Department in 58 Hun 478, 12 N. Y. S. 516, at 518:

> "It was simply a reservation of Mr. Lathrop's rights, claims, and demands against these corporations for the damages which he had sustained by reason of their continuous trespasses while he was the owner of the property; a reservation, also, of the rights, claims and demands which might thereafter accrue to Messrs. Gillie and Walker for such damages as they should

sustain by reason of like trespasses during the ownership. And these reservations were a mere personal contract, binding only on Gillie and Walker.

The easements in question being appendant to the land and incident to its use, Mr. Lathrop could not reserve to himself the right to restrain their invasion after he had ceased to own the property. The right to enjoin the continuous deprivation of such incidents can only be possessed and enforced by the owner of the fee. He alone can be interested in maintaining free access to his premises, and in defending the incidental enjoyment of light and air.

But, even if these easements could be and were reserved, the plaintiff purchased from Gillie and Walker without notice of such reservation. The instrument under which such reservation is claimed was not recorded, and the plaintiff was certainly not put upon inquiry as to an unrecorded document limiting the estate granted in a recorded deed. The only inquiry put upon the plaintiff was as to the rights of the defendants."

6. Respondent was not chargeable with notice of the alleged reservation. No claim was made that the respondent had actual notice of the alleged reservation by City Investing Company contained in the unrecorded contract of sale made in 1919. As said by Clark, J., "indeed, the master would not stop to hear evidence of lack thereof" from the present respondent (R. 221, 150). The deed made by City Investing Company made in 1920 to G. Benenson Investing Company, Inc. (R. 173), contains no reference whatsoever to the unrecorded contract of sale. Ordinarily a contract of sale is deemed merged in the deed and the deed is presumed to contain the final agreement of the parties. *Murdock* v. *Gilchrist*, 52 N. Y. 242, at 246 (1873). Therefore, so far as subsequent purchasers were concerned, they were entitled to rely upon the assumption that any clauses contained in the contract of sale were merged in the deed, and that such deed contained the final agreement of the parties.

The recital in a deed made six years later, to which City Investing Company was not a party, to the effect that the property was being conveyed "subject to unrecorded agreements affecting said real estate" (R. 187), or references in later instruments to "agreements relating to maintenance of elevated station" (R. 193-199), did not constitute notice under the recording acts of the attempted reservation in the unrecorded contract of sale made in 1919. *Todd* v. *Eighmie,* 4 A. D. 9, 38 N. Y. S. 304; *People's Trust Co.* v. *Tonkonogy,* 144 A. D. 333, 128 N. Y. S. 1055; *Comfi Homes Corp.* v. *Goldsmith,* 257 A. D. 212, 11 N. Y. S. (2d) 568.

When City Investing Company transferred this property without incorporating in the deed any reservation of its rights it in effect represented to future owners that it had conveyed all of its interest in the premises except as otherwise specifically stated in said deed. In *Houghtaling* v. *Stoothoff,* 170 Misc. 773, 12 N. Y. S. (2d) 207, at 211 (1939), the court said:

> "And further, there is a presumption or rule in the interpretation of conveyances that a grantor is presumed to intend to convey all the interest owned by him in the premises described, unless the intent to pass a less estate is expressly manifested in the deed, or is fairly to be implied from the terms of the grant. An exception of the fee is never implied and must appear in express terms. *Blackman* v. *Striker,* 142 N. Y. 555, at page 561, 37 N. E. 484; *Myers* v. *Bell Tel. Co.,* 83 App. Div. 623, 82 N. Y. S. 83."

It would be against public policy to hold that such indefinite references in a recorded conveyance are binding upon subsequent purchasers. This would in effect render the title to this property forever unmarketable. An owner would always be faced with the possibility that someone at some time would claim an unrecorded agreement with a prior owner. The references in the deeds and mortgages were inserted, not to bind subsequent owners, but merely to avoid claims for breach of warranty as between the immediate parties. In *Sweet* v. *Henry,* 175 N. Y. 268, cited by petitioner, the reference was specific, not vague.

As said by the Circuit Court of Appeals (R. 221-222):

> "But, be that as it may, the reference is altogether too uncertain to put appellant on notice. If it pointed to anything at all, its natural referent would be the original covenant of December 3, 1907, with its sixteen paragraphs of agreement, which was unrecorded. Moreover, if meticulousness gags at the use of the plural 'agreements', it may be noted that that covenant had at least one later modification through the parties' actions, namely, substitution of McBride's ticket agency for the ticket office therein referred to. Certainly the reference is not at all apt to a contract of sale, completed by and merged in an unrestricted conveyance. And the reference is made clear by a contemporary statement in the chain of title, to wit, in the instrument for the consolidation of the mortgages, repeated in certain of the later deeds, that the property was subject to 'agreements relating to maintenance of elevated station'—apt reference to the original covenant, but not to the later sale contract. The case relied on by the master, *Ebling Brewing Co.* v. *Gennaro,* 189 App. Div. 782, 179 N. Y. S. 384, merely recognizes the general rule that an apt reference to an unrecorded instrument may place a later taker under the duty of inquiry; but then it actually holds that the taker is not responsible for the recitals within the unrecorded instrument itself and thus states a rule more strict than we need assert here. See also *Acer* v. *Westcott,* 46 N. Y. 384; *Great Southern Land Co.* v. *Valley Securities Co.,* 162 Miss. 120, 137 So. 510, 82 A. L. R. 405, with annotation at 412."

The City Investing Company should be estopped from claiming that it is entitled to receive the benefits of said contract, first, because it deliberately omitted from its deed conveying the property any reference thereto, and second, because it turned over the original contract to its grantee, thereby clothing such grantee with apparent full indicia of ownership. The following authorities hold that one who clothes another with apparent ownership of a chose in action or of goods and chattels will be precluded from asserting his title against a bona fide purchaser: *Moore* v.

Metropolitan National Bank, 55 N. Y. 41, at 47; *First National Bank* v. *Mayer,* 27 Fed. Sup. 44; *New York Life Ins. Co.* v. *Brown,* 99 Fed. (2d) 199, certiorari denied 306 U. S. 638.

POINT III

The petition for a writ of certiorari should be denied.

Respectfully submitted,

LEONARD G. BISCO,
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165 Broadway Building, Inc.

DAVID BARNETT,
of Counsel.